

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

P R E S E N T: HON. BRUCE E. TOLBERT, J. S. C.

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In the Matter of the Application of  
David K. Fiveson,

Plaintiff - Petitioner,

-against-

Nanette J. Albanese is the SCARSDALE  
TOWN/VILLAGE TAX ASSESSOR and  
THE TOWN/VILLAGE OF SCARSDALE,

Defendants - Respondents,

DECISION AND ORDER

Index # 3488-14 / Sequence#1

Index #3488-14 / Sequence #2

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The following documents numbered 1-21 were read on Plaintiff-  
Petitioner's Article 78 Proceeding and Defendants-Respondents' Motion to  
Dismiss:

DOCUMENTS NUMBERED

|   |         |
|---|---------|
| Plaintiff-Petitioner's Petition Pursuant to<br>CPLR Article 78 and Exhibits | 1 - 7   |
| Defendants-Respondents Motion to Dismiss, Affirmation<br>and Exhibits       | 8 - 13  |
| Affirmation in Opposition   | 14 - 20 |
| Reply Affirmation   | 21      |

The Plaintiff-Petitioner filed a petition pursuant to Article 78 seeking a  
Judgment against the Town and Village of Scarsdale and related Defendants-

Respondents. This application is based upon a 2014 property reassessment. Movant seeks a Judgment that grants him his requested relief in two parts:

1. A Judgment pursuant to CPLR Section 7801 et seq., declaring Scarsdale's Inspection Protocol and Process Methodology ("Inspection Protocol") for its 2014 property reassessment as arbitrary and capricious as violative of the Due Process Provision of the Fourteenth Amendment to the United States Constitution; and
2. A Judgment pursuant to CPLR Section 7801 et seq., declaring the determination by the Board of Assessment Review conducted for the 2014 tax assessment for the premises 11 Claremont Road, Scarsdale, New York 10583 (the "Premises"), was arbitrary and capricious, and consequently void and has no effect on the basis that Scarsdale disregarded an appraisal report setting forth the 2014 value of the premises and photographs of the Premises, but rather based its 2014 tax assessment valuation on the Inspection Protocol.

In response the Defendants-Respondents ("Municipality") filed a Motion to Dismiss pursuant to Civil Practice Law and Rules Section 3211(a)(4) and (a)(7) and Civil Practice Law and Rules Section 7804(f). The Municipality asserts a very strong defense of the Action brought by Movant and sets forth a comprehensive analysis of the facts as they unraveled.

Scarsdale in commencing a property revaluation, which had not occurred since 1969, hired a contractor to ensure that the revaluation of all properties would be uniform and equitable. As per the contractor, the data collection would consist of an inspection and measurement of all properties to determine square footage, the number of amenities and the type of amenities in order to provide an accurate estimate of the value as the basis for local taxes.

Particular to the Movant, the contractor had visited the premises twice and then followed with a letter to request an interior inspection. With no response having been received, a final letter making the request was sent. In that letter, there was strong language indicating that failure to respond would result in the assignment of the highest standard for kitchen and bathroom quality, overall interior condition, construction grade and basement finishing. The intention was made clear and there was no waivering. Thereafter, correspondence came from the Movant questioning the inspection of his home without a search warrant. Albeit, this court notes, that there is not an indicia in

this case of criminal activity. The Municipality responded that the inspection was voluntary.

In his papers, Movant alleges that his refusal of allowing entry to the premises, was based on the Fourth and Fourteenth Amendments of the Constitution of the United States. However, to his disdain, the Village assumed the highest level of quality and value in his revaluation. However, he was in fact clearly apprised of the fact that such would be the case. The argument by the Movant is that he in fact obtained an appraisal which establishes the value at \$1,000,000 and the assessment set at \$1,343,000 indicates a false value by the Municipality. It should be noted that although he has an appraisal, it is not a given that his appraisal is in fact wholly correct and accurate. Additionally, he also argues the comparable property value of a property located next door to his premises, attempting to strengthen his argument of the false value of his premises established by the Municipality. In addition to this action herein Movant filed a Real Property Tax Law Petition pursuant to Article 7.

What is troubling this Court upon the review of this matter, is that all of the residents of Scarsdale were treated the same in the sense of the Inspection Protocol. There is neither random nor disparate treatment under this fact pattern. The nature of an Article 78 proceeding under this fact pattern is daunting. Moreover, the claim is moot because if the complaint about the Inspection Protocol is the issue, such has been stopped. The revaluation process has ended and the tax roll has been completed.

Additionally, those in disagreement have not only filed Article 7 grievance proceedings, and they are complete. The Movant himself has in fact filed an Article 7 proceeding (Index number 67196/14) which is scheduled to be heard in this Court on August 8, 2017 at 9:30 am. It is this Court's understanding that the Federal Action is no longer pending.

Article 7 of the Real Property Tax Law, governs tax grievances for property owners. That is the proper channel and venue by which to challenge the assessment and its fairness. Full opportunities are given to litigants to file their own appraisal of the property in question and in addition the use of comparable properties and their assessments come into play. It has been said that Article 7 of the RPTL is in fact the exclusive procedure for review of property assessment, unless otherwise provided by law. See, Niagara Mohawk Power Corp. V. School

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District of City of Troy (59 N.Y. 2d 262(1983)). That challenge by the Movant will be fully assessed by the Court, with a right to a trial on the issues if not addressed in a settlement.

As to the arguments raised in the Article 78 claim the argument that it is Fourth Amendment violation to have the requirement of a house inspection for the reassessment protocol. Movant relies on the matter of Jacobowitz v. Board of Assessor for Town of Cornwall, 121 Ad 3d 294 ( 2<sup>nd</sup> Dept 2014). What simply distinguishes this fact pattern and the *Jacobowitz* fact pattern is that the Court ruled against the inspection but it was sought after a case was filed seeking a tax grievance. This case moves in the fact pattern of before any grievance was filed.

Now turning to the argument that the Municipality violated the Equal Protection Clause, claimed by movant. This argument is squarely placed outside the framework of any rational interpretation of the Constitution. In the context of a Selective Enforcement Claim, the Plaintiff-Petitioner, compared with others similarly situated was not selectively treated and such treatment was not based on impermissible considerations like, race, religion, punishment or cause of injury. See, Zahra v. Town of Southold, 48 F. 3d 674 (2d Cir.1995). The allegations made by Movant clearly indicate that the Inspection Protocol was part of the reassessment process and that he in fact denied the inspection. This Court is very clear, that there was not a violative right upon which this Court needs to act. The equal protection claim supported by our Constitution was not meant to be given to anyone who merely raised it nor used flippantly.

Tax assessments are in fact unique in the law. It is a basic fact that everyone hopes to pay the least amount of taxes. These premises are situated in a Municipality that is highly sought after in terms of its desirability for a panoply of reasons. The Article 7 Petition will address these issues in the forum that it was meant to be addressed in.

Upon full review, this Court finds that there is no basis for the relief sought by Movant.

It is Hereby Ordered, that Plaintiff - Petitioner's Article 78 Petition is denied in its entirety and Defendants- Respondents' Motion to Dismiss is granted pursuant to CPLR Section 3211(a) (7) for failure to state a cause of action; and it

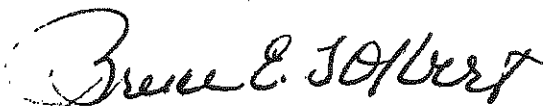
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is further

Ordered, that all parties are directed to appear before this Court, located at 111 Dr. Martin Luther King, Jr. Blvd, White Plains, New York, on August 8, 2017 at 9:30 am for the Article 7 proceeding (Index Number 67196/14).

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
July 28, 2017.



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HON. BRUCE E. TOLBERT, J.S.C.

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